Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms	)	CC Docket No. 98-171
	)	
Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990	)	CC Docket No. 90-571
	)	
Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size	)	CC Docket No. 92-237 NSD File No. L-00-72
	)	
Number Resource Optimization	)	CC Docket No. 99-200
	)	
Telephone Number Portability	)	CC Docket No. 95-116
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170

To: The Commission

PETITION FOR RECONSIDERATION

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SUMMARY

Verizon Wireless commends the Commission for retaining, on an interim basis, a revenue-based assessment methodology for assessing federal universal service contributions. However, in doing so, the Commission imposed expensive and burdensome billing restrictions that are unjustified in the CMRS context, particularly given the interim nature of the rules. The Commission should reconsider and remove the new restrictions that it has placed on CMRS carriers' methods of recovery of universal service contribution costs from their customers. The new restrictions are inconsistent with the regulatory paradigm for wireless carriers and the realities of the wireless marketplace and infringe upon carriers' commercial speech, in violation of the First Amendment.

The record in this proceeding does not demonstrate consumer dissatisfaction or problems with wireless carriers' recovery of USF contributions. In the absence of a marketplace problem, the Commission cannot justify new regulation – especially of this scope. The new restrictions are a one-size-fits-all, landline-centric solution to a problem that does not obtain in the CMRS industry.

Finally, Verizon Wireless urges the Commission to reconsider its decision to impose *retroactive* changes on carriers' universal service reporting requirements. The requirements for filling out the FCC Form 499-Q due February 3, 2003, covering fourth quarter 2002 and first quarter 2003, would require carriers to report revenues accrued and/or billed *before* the effective date of the order pursuant to rules adopted *in* the order. These changes effectively would increase the wireless safe harbor retroactively, which is beyond the Commission's authority to do.

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Verizon Wireless, a national provider of Commercial Mobile Radio Service ("CMRS"), respectfully requests, pursuant to section 405(a) of the Communications Act[1] and section 1.429

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[1] 47 U.S.C. § 405(a).

of the Commission's Rules,[2] that the Commission reconsider its imposition of restrictions on the recovery of universal service fund ("USF") contributions by CMRS carriers, remove these restrictions, and clarify that the revised wireless contribution methodology does not apply to 2002 and January 2003 interstate revenue determinations.[3]

Verizon Wireless commends the Commission for retaining a revenue-based USF assessment mechanism on an interim basis, given the legal infirmities with the per-connection proposals proffered by other parties throughout the earlier stages of this proceeding. In the *December 2002 Order,* however, the Commission imposed interim measures, effective April 1, 2003, limiting carriers' universal service line items to the product of the FCC-established universal service contribution factor and the interstate portion of the individual subscriber's bill. These restrictions impose unjustified and unnecessary burdens on CMRS carriers and will likely confuse CMRS customers.[4] The new requirements preclude averaged line items that are identified as being related to universal service[5] and effectively require all carriers to recover universal service costs through percentage line items. Carriers will need to change the amount of their line items, on less than 20 days notice, each quarter when the USF contribution factor

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2 47 C.F.R. § 1.429.

3 *Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms* Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952 (2002) ("*December 2002 Order*").

4 *December 2002 Order* at ¶¶ 49-52 & App. A (adding 47 C.F.R. § 54.712).

5 *December 2002 Order* at ¶51.

changes. Verizon Wireless and other CMRS carriers will have to expend significant resources to implement these changes, which cannot be justified for interim measures.[6] The recovery restrictions are unnecessary and unjustified in the highly competitive wireless marketplace, and raise serious First Amendment concerns that the *December 2002 Order* unlawfully failed to address. Accordingly, Verizon Wireless respectfully requests that the Commission reconsider its decision to impose these cost recovery restrictions, at least with respect to CMRS carriers, and at least until the Commission reaches a final determination on a contribution mechanism for universal service. CMRS carriers should be permitted to continue to employ averaged line items for USF cost recovery.

I. THE NEW RESTRICTIONS ARBITRARILY REQUIRE COSTLY CHANGES THAT ARE UNWARRANTED AS PART OF AN INTERIM MEASURE

For Verizon Wireless, the transition to a percentage-based line item tied to the contribution factor represents a significant change from its current practice. To simplify customer billing, Verizon Wireless has charged a fixed, averaged line item to recover its contribution costs. Because of historically rising revenues, Verizon Wireless also has been able to increase the line item substantially less often than the quarterly contribution factor has changed, providing customers with predictability in their billing. To further simplify billing, Verizon Wireless has combined several regulatory mandates into a single line item, including USF, LNP, and other federal regulatory fees.

Under the new rules, to recover its USF costs Verizon Wireless will be forced to extract its USF contribution assessments from its unified line item and add a percentage line item to its

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[6] *December 2002 Order* at ¶ 3 (describing the changes made therein as "interim").

bills. This involves complex software changes to multiple billing systems and costly, repeated notifications to customers.[7]

Changes of this scope cannot be justified for an interim measure. The Commission has repeatedly indicated that it favors transitioning to a per-connection USF assessment mechanism over the current revenue-based mechanism.[8] Three out of four proposals in the Second Further Notice of Proposed Rulemaking would reject the current revenue-based assessment in favor of a per-connection approach, and would thus waste Verizon Wireless' (and other carriers') investments in these changes. Because the Commission appears to favor (at least in theory) a connection-based assessment methodology, a temporary switch to recovery based on a specific percentage of each customer's bill makes no sense. If the Commission adopts a per-connection or per-unit approach in the next phase of the proceeding, Verizon Wireless could be required to return to an averaged approach for recovering contributions, subjecting consumers to *two* changes to their bills in a short period of time.

The Commission's prohibition against carriers averaging contribution costs across all end-user customers[9] also cannot be justified when the Commission is considering options for

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[7] The Commission also should formally confirm that wireless carriers may use the same company-specific factor to determine the amount of interstate revenue on a customer's bill, for recovery purposes, that it uses on an aggregate basis, for contribution purposes. *See* ex parte letter of Michael F. Altschul, CTIA, to Marlene H. Dortch, FCC, dated January 16, 2003 (CC Docket No. 96-45).

[8] *December 2002 Order* at ¶3-6; *Federal-State Joint Board on Universal Service, et al.,* Further Notice of Proposed Rulemaking and Report and Order, 17 FCC Rcd 3752 ¶¶3-6 (2002); *Federal-State Joint Board on Universal Service, et al.,* Notice of Proposed Rulemaking, 16 FCC Rcd 9892 ¶¶3-4 (2001).

[9] *December 2002 Order* at ¶51.

assessing a standard fee for each customer's phone number or for each customer's connection. Any per-unit or per-connection charge essentially will average the USF contribution burden over all customers with connections or assigned phone numbers (regardless of whether they make any interstate calls in a given month). If the Commission believes that the public interest effect of customer charges is still an open question, the Commission should address that issue comprehensively in the Second Further Notice, and until it acts in that phase of the proceeding, it should allow carriers to continue to average their contribution recovery charges during the interim period.

A "whipsaw" series of billing changes is bound to upset consumers and, particularly if required by the FCC, is likely to undermine public support for universal service funding. For this reason alone, the Commission should reconsider imposing its rigid USF cost recovery restrictions on wireless carriers during the interim period.

II. THE NEW RESTRICTIONS ARE ARBITRARY, MEANINGLESS AND UNLAWFUL WHEN APPLIED TO WIRELESS SERVICES.

The difficulty that CMRS carriers such as Verizon Wireless face in complying with the *December 2002 Order* is exacerbated by the new restrictions' inconsistency with both the legal framework that currently governs wireless carriers' billing practices, and the actual current billing practices of wireless carriers.

The significant additional restrictions on wireless carriers' billing practices are not justified in the Order by evidence of consumer problems with wireless carriers' billing. Although the record in this proceeding demonstrates consumer dissatisfaction with *other* types of telecommunications carriers' USF cost recovery, no such dissatisfaction is evident with respect

to CMRS carriers.[10] Yet the *December 2002 Order* failed to acknowledge the very different billing issues involved for CMRS, instead adopting a "LEC-centric" approach that led to its imposition of arbitrary and illogical requirements on wireless carriers.

The changes are inconsistent with the historically light FCC regulation governing CMRS billing practices. As the *December 2002 Order* acknowledges, wireless carriers are at liberty to recover USF contributions, related administrative costs, and other regulatory costs through their rates or other fees.[11] Wireless carriers' rates, like their universal service fees, are constrained not by government regulation, but by the highly competitive market in which they operate[12] – a market that has generated sharply falling per-minute prices every year since the service's introduction.[13] Thus, the new rules hold little promise of bringing benefits to CMRS consumers beyond those already brought by the market, yet they will impose substantial costs.

As noted above, Verizon Wireless uses an averaged, flat-rate line item to recover USF contributions as well as other FCC mandate fees. This approach makes cost recovery both simpler and more predictable for the customer and the carrier. The new restrictions would

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[10] *See, e.g., December 2002 Order* at ¶¶18-19; Ad Hoc Telecommunications Users Committee ex parte letter (CC Docket No. 96-45) dated Oct. 3, 2002, at 6; NASUCA ex parte letter (CC Docket No. 96-45) dated June 17, 2002, at appendix p. 3. *But see December 2002 Order* at ¶ 47.

[11] *December 2002 Order* at ¶55.

[12] *See, e.g., 1998 Biennial Regulatory Review, Spectrum Aggregation Limits,* 15 FCC Rcd 9219, 9296 (1999) (sep. statement of Comm. Powell) (describing CMRS as the "most competitive segment of the telecommunications industry").

[13] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993,* Seventh Report*,* 17 FCC Rcd 12985, 13014-16 (2002) ("*Seventh CMRS Competition Report*").

require every aspect of the current cost recovery mechanism to be changed without any evidence of a "problem" to be solved in the CMRS marketplace. Specifically, carriers will need to change line item verbiage and explanations, and provide training and calculation information for customer care representatives who may field calls from customers about new percentage-based charges.

The *December 2002 Order* also failed to account for the fundamental differences between landline and wireless service arrangements. The nature of wireless carrier business relationships with their customers makes it particularly difficult for wireless carriers to make the required changes – especially on such a tight deadline. LECs, for example, publish their charges in state and/or federal tariffs, and are able to give constructive notice of a USF cost recovery change through a simple tariff filing. CMRS carriers, by contrast, are forbidden from filing their charges in tariffs[14], and thus have contractual agreements with their customers. CMRS carriers may be limited by contractual terms from changing the amount of a USF surcharge without first providing notice to customers. In some cases, depending on the terms of the contract and the relevant state law, the change in the line item amount may require 30 days notice, which will not be possible given that the Commission will not publish the April 1, 2003 contribution factor until sometime in March, 2002. The *December 2002 Order*, however, failed to address this "billing cycle" problem, again showing that the Commission simply chose an arbitrary "one-size-fits-all" approach to new regulations.

These new, costly restrictions will not even accomplish the Commission's stated goal of ensuring that carriers' USF line items "accurately reflect the extent of a carrier's contribution

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[14] 47 C.F.R. § 20.15(c).

obligations."[15] Carriers will contribute based on projected revenues until their revenues are trued up to actual revenues filed on the Form 499-A, after which USAC will "refund or collect from contributors any over-payments or under-payments."[16] Whether these refunds or collections will occur in lump-sum payments or will be spread over time in carriers' monthly USAC bills, it is clear that it will result in carriers' net obligations to USAC in any given quarter differing from the contribution factor.[17] As long as carriers continue to assess customers based on the contribution factor, the benefit or burden of the true-up process will accrue to customers other than the ones that paid for (or received the benefit of) the original projection. This is particularly true in the wireless industry, where carriers report churn rates between 4.5% and 9% per quarter.[18]

Ultimately, the Commission's effort to align so precisely assessment and recovery is wrong-headed. The goal should be, instead, to ensure that the assessment mechanism meets the statutory requirements that it be equitable and non-discriminatory.[19] Once that is achieved, the

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[15] *December 2002 Order* at ¶ 45.

[16] *Id.* at ¶ 36.

[17] The Commission rejected collect-and-remit assessment, which would use *current* (rather than historical or projected) revenues to establish assessment levels, because it would "reduce incentives for carriers to recover universal service contributions from their customers," *December 2002 Order* at ¶ 39. Yet the Commission has no evidence that carriers would not fully collect their contributions, and several state funds successfully have used collect-and-remit approaches.

[18] *Seventh CMRS Competition Report,* 17 FCC Rcd at 13009 (citing churn rates between 1.5% and 3% per month).

[19] 47 U.S.C. § 254(d). As Verizon Wireless has demonstrated at length in this proceeding, the revenue-based assessment meets that criterion better than any other proffered in this proceeding.

Commission can act under sections 201 and 202 to address charges which it finds unlawful. But there is no evidence in this proceeding of any such problems in the CMRS marketplace. Therefore, the new restrictions on CMRS carriers' contribution recovery cannot be justified.

III. THE NEW RESTRICTIONS ON CMRS CARRIERS' USF COST RECOVERY ARE OVERBROAD AND ILLEGAL RESTRICTIONS ON COMMERCIAL SPEECH.

As demonstrated in sections I and II above, the new restrictions on recovery of universal service contributions, as applied to CMRS carriers, will be costly, burdensome, and disruptive to consumers with no corresponding benefit. The restrictions are, in the context of the CMRS marketplace, much broader than necessary to achieve the Commission's goals and are legally unsound.

The Commission could have imposed substantially less burdensome restrictions on wireless carriers to achieve its goals of fairness, accuracy, and transparency.[20] It would have been sufficient merely to prohibit CMRS carriers from recovering excessive amounts from any class of customers in order to benefit any other class of customers, and forbidding carriers from recovering from their customers more in the aggregate than they contribute.

First, by imposing new restrictions that it knows will require CMRS carriers to implement costly and disruptive billing changes, the Commission essentially has created an incentive for wireless carriers to roll the charge into their rates, despite Congress's clear intention, confirmed by the courts, that the Commission's universal service system should

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[20] *See December 2002 Order* at ¶¶ 40-45.

remove implicit subsidies in favor of explicit subsidies wherever possible.[21] Hiding subsidies to rural LECs in competitive wireless carrier rates accomplishes nothing more than shifting implicit subsidy burdens among different industry sectors and customers.

Second, by permitting carriers only to recover from any given customer the amount of the assessment rate times a customer's interstate revenue,[22] the Commission has required carriers to treat universal service contributions as if they were a tax, which the courts have determined they are not.[23] These conflicting approaches towards protecting consumers yield unfortunate results: longer more complicated wireless bills, with sub-sections of increasing levels of surcharges, fees and taxes on wireless customers.

The new universal service cost recovery restrictions also violate the First Amendment of the U.S. Constitution by unlawfully restricting carriers' legitimate commercial speech. By limiting universal service cost recovery to a single line item uniquely dedicated to universal service, the Commission has effectively banned the use of numerous alternative – and lawful – line item presentations. Additionally, prohibiting carriers from referencing universal service if they choose to retain a more general regulatory fee line item is overly restrictive, because carriers

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[21] *See Comsat Corp. v. FCC*; 250 F.3d 931, 938 (5th Cir. 2001); *Alenco Communications, Inc. v. FCC,* 201 F.3d 608, 623 (5th Cir. 2000); *Texas Office of Public Util. Counsel v. FCC,* 183 F.3d 393, 425 (5th Cir. 1999).

[22] Although this restriction as a whole is flawed from a legal and a policy perspective as applied to wireless carriers, the Commission at least has acknowledged that wireless carriers may use the same estimates of interstate revenues for recovery that they use for reporting. *See, e.g., December 2002 Order* at ¶ 51 & n.131.

[23] *Texas Office of Public Utility Counsel v. FCC,* 183 F.3d 393, 427-28 (5th Cir. 1999). Indeed, as a tax, universal service contributions would violate the Origination Clause of the Constitution. *Id.* at 427.

could in fact disclose to customers exactly which types of charges are included in such an aggregated fee. As the Commission itself has recognized, "restrictions on speech that ban truthful, non-misleading commercial speech about a lawful product cannot withstand scrutiny under the First Amendment."[24] Further, to withstand First Amendment scrutiny, the Commission must be able to demonstrate that the universal service cost recovery restrictions directly advance a substantial government interest and that the restrictions are no more extensive than necessary.[25] The Commission cannot satisfy this test.

Verizon Wireless grants that the Commission's interest in "preventing fraudulent and misleading practices by carriers and ensuring that consumers are able to make intelligent and well informed commercial decisions" is substantial.[26] However, the universal service cost recovery restrictions do not advance this interest directly and are not narrowly tailored to protect consumers. Mere "speculation and conjecture" are insufficient to justify commercial speech restrictions – the Commission must demonstrate that "that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[27]

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[24] *Truth-in-Billing and Billing Format*, Notice of Proposed Rulemaking, 13 FCC Rcd 18176, ¶ 15 (1998).

[25] *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980); *Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms;* Further Notice of Proposed Rulemaking and Report and Order, 17 FCC Rcd 3752, ¶ 104 (2002).

[26] *Truth-in-Billing and Billing Format*, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492, ¶ 61 (1999) ("*TIB*").

[27] *Lorrillard Tobacco Co. v. Reilly*, 121 S.Ct. 2404, 2422 (2001) (quoting *Greater New Orleans Broad. Ass'n, Inc.* v. *United States*, 527 U.S. 173, 188 (1999)).

Importantly, the Commission cannot demonstrate that there is consumer harm in the CMRS context that necessitates the adopted restrictions on commercial speech. As Verizon Wireless pointed out in its comments in the universal service reform proceeding, there is no record of complaints against CMRS providers regarding misleading billing practices. In the Truth-in-Billing docket, the Commission acknowledged this fact, stating that the record does not "indicate that CMRS billing practices fail to provide consumers with the clear and non-misleading information they need to make informed choices."[28]

Even if the Commission could demonstrate, which it cannot, that current CMRS universal service line item billing practices have misled consumers, the recovery restrictions are not narrowly tailored to advance the goal of consumer protection.[29] The best the Commission can offer in support of its universal service recovery requirements is that they "*should* eliminate a significant portion of the consumer frustration and confusion pertaining to universal service line items" and "*should* foster a more competitive market by better enabling customers to comparison shop among carriers."[30] This possibility is not enough to pass Constitutional muster. The CMRS industry is highly competitive and market forces alone are sufficient to ensure that universal service rates remain at competitive levels.

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[28] *TIB at* ¶ 16. In that Order the Commission relied on its conclusions of differences in the scope of the problem between landline and CMRS carriers to adopt less onerous billing rules for CMRS. Here, however, the Commission departed without explanation from that analysis, and summarily swept CMRS into landline rules. This error alone warrants reconsideration.

[29] *See Lorrillard*, 121 S.Ct. at 2422.

[30] *December 2002 Order* at ¶50 (emphasis added).

Moreover, the Commission cannot demonstrate that the benefits of the recovery requirements benefits outweigh the implementation costs, particularly given the Commission's own documented preference to adopt a per-connection approach to assessing USF in the near future. If the public interest would not be harmed by assessing a standard averaged fee for each customer's phone number or for each customer's connection (as proposed in the Second Further Notice) – then the Commission cannot assert a public interest basis for prohibiting CMRS carriers from averaging their assessment obligations evenly over their own customer bases, at least during the interim period until a final methodology is determined. Carriers will need to expend significant effort and funds to modify their billing systems and notify their customers. Such expenditures are not justified to comply with interim universal service requirements that promise no meaningful benefits in the CMRS marketplace.

IV. THE COMMISSION CANNOT RETROACTIVELY CHANGE THE REPORTING REQUIREMENTS FOR FOURTH QUARTER 2002 REVENUES AND FIRST QUARTER 2003 REVENUES

In the *December 2002 Order*, the Commission requires mobile wireless providers availing themselves of the interim safe harbor to report 28.5 percent of their telecommunications revenues as interstate beginning with fourth quarter 2002 revenues reported on the February 1, 2003 FCC Form 499-Q.[31] Additionally, while the language is not clear, CMRS carriers must use the revised safe harbor (or alternate company-specific proxies) to determine their 2002 annual telecommunications revenues for the 499-A filing due on April 1, 2003.[32] The purpose of the 499-A filing is to allow for "true-ups" in the case of over- or under-assessments of carriers,

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[31] *December 2002 Order* at ¶ 24.

[32] *December 2002 Order* at ¶ 27.

based on end-of the year actual revenue results, as well as to determine assessments for other government mandates (i.e., LNP and TRS). Given that the effective date of the *December 2002 Order* is not until February 1, 2003, there is no legal basis for the Commission to increase the wireless safe harbor retroactively (or to impose the "all-or nothing" affiliate rules) for the determination of any 2002 wireless interstate revenues, and correspondingly, wireless carrier obligations under the USF, LNP or TRS programs.[33] The Commission should clarify its order to preclude any interpretation that wireless carriers could be required to pay increased governmental mandate assessments for any portion of 2002, based upon the changes in the *December 2002 Order*. Given that the Fourth Quarter 2002 499-Q report is due to be filed on February 3, 2003, Verizon Wireless respectfully requests that the Commission clarify this straight-forward legal issue prior to the filing deadline, or alternatively instruct USAC through a timely reconsideration order to allow wireless carriers to re-file their Fourth Quarter 2002 499-Q and 2002 499-A reports based on the legal requirements in effect during 2002.

CONCLUSION

Verizon Wireless respectfully requests that the Commission reconsider, with respect to CMRS carriers, its prohibition of averaged USF cost recovery fees and remove its new requirement that carriers' universal service line items be limited to the product of the FCC-established universal service contribution factor and the interstate portion of the individual subscriber's bill. Verizon Wireless also requests that the Commission clarify that 2002 wireless

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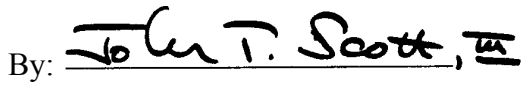
[33] The *Commission* should also clarify that the 2004 499A will not require the use of the revised safe harbor or proxy methodologies for estimating revenues earned during January 2003.

carrier contributions and first quarter 2003 wireless carrier contributions will not be determined or assessed based upon the revised methodologies for calculating wireless interstate revenues, which become effective on February 1, 2003.

Respectfully submitted,

VERIZON WIRELESS

By: 

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